STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE PUBLIC LIBRARY EMPLOYEES,
LOCAL 67, COUNCIL 40, AFSCME, AFL-CIO, Complainant,

v.

RACINE PUBLIC LIBRARY, Respondent.

Case 815
No. 71329
MP-4699

Decision No. 33852-A

Appearances:

Mr. Bruce Ehlke, Ehlke, Bero-Lehmann & Lounsbury, S.C., Attorneys at Law, 6502 Grand Teton Plaza, Suite 202 Madison, WI 53719, for the labor organization.

Mr. Scott Letteney, Deputy City Attorney, City of Racine, 730 Washington Avenue, Suite 201, Racine, Wisconsin 53403, for the municipal employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On December 27, 2011, Racine Public Library Employees, Local 67, Council 40, AFSCME, AFL-CIO filed a complaint with the Wisconsin Employment Relations Commission alleging that the Racine Public Library had committed prohibited practices within the meaning of the Municipal Employment Relations Act, specifically violating Secs. 111.70(3)(a) 1, 2 and 4, Wis. Stats., by refusing to recognize at-large officers of the newly merged Local 67. Hearing in the matter was held on June 26, 2012, in Racine, Wisconsin, before Hearing Examiner Stuart D. Levitan, a member of the Commission's staff. A transcript was made available to the parties on July 5, 2012. The parties filed written arguments by October 11, 2012. On October 19, 2012, the Examiner requested the parties file a Supplemental Brief addressing two specific questions, which they did by November 19, 2012. The Examiner, being fully advised in the premises, hereby issues the following

FINDINGS OF FACT

1. On March 26, 2008, the Wisconsin Employment Relations Commission conducted an election to determine whether employees of the Racine Public Library wished to be represented for purposes of collective bargaining by Council 40, AFSCME, AFL-CIO. The WERC tally sheet indicated that 18 employees voted in the affirmative and 16 employees voted against such representation. On April 21, 2008, the Commission conducted a hearing into objections to the election which the city had filed, at which time the parties agreed to a separate bargaining unit to be known as "Local 67, AFSCME, AFL-CIO (Racine Public Library Unit)," consisting of all regular full-time and regular part-time employees of the City of Racine Library, excluding pages, supervisory, managerial, professional, confidential and temporary employees and Bookmobile Associates, Assistants and Drivers. On May 7, 2008, the Commission issued a Certification of Representative, certifying such a bargaining unit.

2. The Racine Public Library ("the Library") is a municipal employer providing library services in an around Racine, Wisconsin.

3. All members of Local 67 (Racine Public Library Unit) are employees of the Library and under the authority of the Racine Library Board, and are not employees of the City of Racine.

4. Local 67, AFSCME, AFL-CIO (Racine Public Library Unit) and the Racine Public Library executed their first collective bargaining agreement on April 19, 2010, for the period May 7, 2008 – December 31, 2010.

5. Prior to the spring of 2011, there were six bargaining units within Local 67, representing various City of Racine and Town of Waterford employees. On April 18, 2011, AFSCME International President Gerald W. McEntee approved an amended constitution for Local 67 which merged its various locals into an organization identified as "Racine, Wisconsin, City Employees, Local Number 67 of the American Federation of State, County and Municipal Employees, AFL-CIO." On July 14, 2011, AFSCME Council 40 Staff Representative Nick Kasmer wrote to the city's Human Resources Director, Terry Parker, as follows:

> Enclosed please find the newly adopted Constitution of AFSCME Local 67 with the relevant pages indicating the merger of all Local 67 units. The International Union has recently sought to merge outlying locals or locals with multiple Constitutions into one local. This specifically applies to the City of Racine with regards to the Crossing Guards and Library Units upon which AFSCME services. Both of the aforementioned units were or were going to be separate units although affiliated with Local 67; they would have had their own officers as well as Constitutions. The recent merger now means that the at large officers for the former/current Local 67 units will now be functioning as the at large officers for both the Library and Crossing Guard units as well. Said units will

still have their own stewards, but the at large officers will function in their given capacity for those units as well. I hope this clears up the confusion or misunderstanding with regards to this recent merger; I would be happy to answer any further questions you may have with regards to this.

6. The Constitution referred to in Finding of Fact 5 includes the following provisions:

ARTICLE VI OFFICERS, NOMINATIONS, AND ELECTIONS

Section 1. The executive board of this local shall consist of ten (10) members elected as follows:

a. Table Officers: The table officers shall be the president, vice president, recording secretary, treasurer and chief steward all of whom shall be elected at-large by the entire membership of the local.

b. Bargaining Unit Representatives: Each of the bargaining unit representatives (sic) enumerated in Article IV, Section 1, except for the Town of Waterford, shall elect a representative from among its members who shall serve on the executive board.

. . .

Section 4. To be eligible for office, a member must be in good standing for one year immediately preceding the election; provided, however, that no retired member shall be a candidate for office.

. . .

ARTICLE VII DUTIES OF OFFICERS AND EXECUTIVE BOARD

. . .

Section 6. Bargaining unit representatives who serve on the executive board shall:

a. Serve as the primary liaison between the local union and the bargaining unit they represent.

b. Attend all meetings of the executive board and the local union membership.

c. Report to the executive board and the local union membership on progress and status of contract negotiations, grievances, and other business affecting the members of the bargaining unit they represent.

7. Scott Sharp is a former employee of the City of Racine, having retired after more than 35 years in its Department of Public Works. As of June, 2012, following his retirement, he was the incumbent President of Local 67.

8. The Racine Library Board has declined to recognize any person (other than a Council 40, AFSCME, AFL-CIO Staff Representative) who is not an employee of the Library as a representative of the library bargaining unit for the purpose of collective bargaining or contract administration.

On the basis of the above and foregoing Findings of Fact, I hereby make and issue the following

CONCLUSIONS OF LAW

1. Racine Public Library Employees, Local 67, Council 40, AFSCME, AFL-CIO, is a labor organization as defined in sec. 111.70(1)(h), Wis. Stats.

2. Racine Public Library is a municipal employer as defined in sec. 111.70(1)(j), Wis. Stats.

3. By refusing to recognize any person who is not either an employee of the Library or a Staff Representative for Council 40, AFSCME, AFL-CIO, for the purpose of collective bargaining or contract administration on behalf of Local 67, AFSCME, AFL-CIO (Racine Public Library Unit), the Racine Public Library violated Secs. 111.70(3)(a)1, 2 and 4, Wis. Stats.

On the basis of the above and foregoing Conclusions of Law, I hereby make and issue the following

ORDER

Respondent Racine Public Library shall:

1. Immediately recognize any person Local 67, AFSCME, AFL-CIO (Racine Public Library Unit) identifies as its representative for collective bargaining and contract administration;

2. Within five working days of this Order, post in a place where employee notices are customarily kept, and maintain for no less than thirty days, the Notice identified as "Appendix A," signed by the Library Director or the Director's designee;

3. Notify the undersigned Examiner within ten days of the date of this Order as to the steps it has taken to comply therewith.

Dated at Madison, Wisconsin, this 17th day of December, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/

Stuart D. Levitan, Examiner

APPENDIX "A"

Pursuant to an Order from the Wisconsin Employment Relations Commission, the Racine Public Library shall recognize and conduct business with any person Local 67, AFSCME, AFL-CIO, (Racine Public Library Unit) identifies as a representative for the purpose of collective bargaining or contract administration.

Dated at Racine, Wisconsin, this _______________ day of December, 2012.

____
Director, Racine Public Library (or designee)

RACINE PUBLIC LIBRARY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

In support of its position that the Respondent committed prohibited practices, the Union asserts and avers as follows:

> Sec. 111.70(2), Wis. Stats., states the obvious proposition that members of a labor organization have the right to arrange their own internal affairs and choose their own representatives. Disputes concerning a local union's right to choose its own representatives are rare, but state and federal labor agencies have affirmed that right. By refusing to recognize and conduct business related to the bargaining unit with any AFSCME representative who is not its employee, other than a staff representative, the Racine Public Library has interfered with the union's right to select representatives of its own choosing and thus violated sections 111.70(3)(a) 1, 2 and 4, Wis. Stats. The Library should be ordered to cease and desist from such unlawful conduct; be ordered to recognize the representatives chosen by the union, and to post the appropriate notices.

In support of its position that it did not commit prohibited practices, the Employer asserts and avers as follows:

> The Library is not required to conduct union-related business with a person who is not an employee of the Library. None of the cases which the union cites address the relevant issue in this case, in that none involved union representatives who were not in the employ of the relevant employer. Not one of the cases is on point, and all may be ignored. The union is left with the cold reality that it can present no case, no decision, no precedent that addresses the actual issue in this matter.
>
> Employers are generally permitted to treat non-employee union representatives differently from employee representatives of the union. An employer may even treat employee representatives of a separate bargaining unit differently, even where the unit is made up of employees of the same employer.
>
> The union cannot present any law that specifically says that a municipal employer must recognize and conduct business with a member of union leadership who is not an employee of the municipal employer. Certainly the union may elect whomsoever it chooses as an officer; this does not mean that a municipal employer is forced to conduct employee-related business with a non-employee. The complaint should be dismissed.

In reply, the union posits further as follows:

All three of the library's propositions – that the Union was obligated to provide evidence about its internal administration; that the Library was not obligated to bargain regarding the pay for non-bargaining unit representatives when they are engaged in such business, and that the union had not cited any relevant cases – lack merit.

The union's internal administration is none of the Library's business; the efficacy of the union's designation of its representatives does not depend on the employer's satisfaction with its internal operating procedures.

That the employer may not be obligated to bargain regarding the pay status of its designated representatives because they are not the employer's employees is irrelevant. The pay status of the designated representative is a matter between the representative and the representative's employer, and has no bearing on their right to represent the bargaining unit.

Finally, the union did cite a case from the commission's predecessor agency that is directly on point. That there are not additional cases is understandable, in that the proposition of the union being able to select its own representatives is self-evident.

In its Supplemental Brief, the Union states:

Whether AFSCME Local 67 complied with its constitution in selecting its representatives is not a relevant factor in determining whether the Library committed prohibited practices. As long as a union representative has the apparent authority to speak on behalf of the union, the employer may rely on his authority to do so. A union has no more of an obligation to provide information concerning the administration of its internal affairs to an employer than an employer has an obligation to account to the union of its internal management processes.

Moreover, Local 67 complied with its constitution in selecting its representatives. Although President Scott Sharp is now retired, his continued employment is not a condition of his eligibility to serve as President; the Constitution only requires that he had to have been a City employee for at least one year at the time he was a "candidate" for office, and there is no evidence he wasn't. Further, the Constitution does not require that the bargaining committee members be members of the particular bargaining unit represented by each such Committee. Local 67 complied with its Constitution and there is no evidence it did not.

In its Supplemental Brief, the Library states that it has no information to suggest Local 67 has complied with its Constitution, but that this issue is not a relevant factor in determining whether the Library violated the Union's statutory rights.

DISCUSSION

Section 111.70(3)(a), Wis. Stats., [1] makes it a prohibited practice for a municipal employer individually or in concert with others:

1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).

2. To initiate, create, dominate or interfere with the formation or administration of any labor organization or contribute financial support to it ....

. . .

4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit....

Sec. 111.70(2), provides in relevant part as follows:

> (2) RIGHTS OF MUNICIPAL EMPLOYEES. Municipal employees have the right of self-organization, and the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Municipal employees have the right to refrain from any and all such activities.

In A.L. Shafton and Company, Dec. No. 2041 (WERB, 3/49), our predecessor agency considered a situation where a private sector employer refused to meet with or bargain with a labor organization representing its employees as long as the union was represented by its business representative and general secretary. The WERB found that "by their refusal to carry on collective bargaining negotiations with the complainant Union through its business representative," respondents had interfered with the administration of the union in violation of Sec. 111.06(1)(b). That statute, unchanged in material aspects, made it an unfair labor practice for an employer to "interfere with the ... administration of any labor organization ...," making it the functional equivalent of sec. 111.70(3)(a)2., which is one of the statutes the union alleges the library violated. The Board ordered the respondents to "cease and desist from interfering in any way with the administration of the affairs" of the union, and to "particularly cease and

[1] All subsequent references to provisions in Sec. 111.70 are to subsections in the Wisconsin Statutes.

desist from placing limitations upon a representative or representatives whom the employe(e)s are permitted to designate as their representatives." Id., at 3-4.

Even when the statutes have not required full collective bargaining, the Commission has validated the right to representation. As was held in Whitehall School District and Board of Education of the Whitehall School District, Dec. No. 10268-B, (WERC, 9/71):

> "....Section 111.70(2) clearly mandates that municipal employe(e)s have a right to be represented by a labor organization of their own choice when conferences and negotiations do occur concerning their wages, hours and working conditions. The denial of representation in a conference does interfere with the right to be represented set forth in Section 111.70(2), and in denying representation in such a conference the Municipal Employer here has committed prohibited practices within the meaning of Section 111.70(3)(a)1." Dec. No. 10268-B, at 4.

Section 111.70(2), substantially tracks Section 7 of the National Labor Relations Act, which provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

In a seminal case, the United States Supreme Court has described this statutory right of employees to self-organization, including the right to select representatives of their own choosing, as "a fundamental right," explaining:

> Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 257 U. S. 209. We reiterated these views when we had under consideration the Railway Labor Act of 1926. Fully recognizing the legality of collective action on the part of

> employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right, but could safeguard it. Congress could seek to make appropriate collective action of employees an instrument of peace, rather than of strife. We said that such collective action would be a mockery if representation were made futile by interference with freedom of choice. Hence, the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, "instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both." Texas & N.O. R. Co. v. Railway Clerks, *supra*. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937)

Lower federal courts have recognized that Section 7 "encompasses the right of employees to select, absent extraordinary circumstances, whomever they wish to represent them in collective negotiations with employers." National Labor Relations Board, Petitioner, v. Indiana and Michigan Electric Company, Respondent, 599 F.2d 185 (7th Cir., 1979). It is the employer's burden to show the existence of such extraordinary circumstances; otherwise, the employer violates the Act by interfering with its employees' choice of negotiators, or by refusing to deal with the negotiators once selected. Minnesota Mining and Manufacturing Co. v. NLRB, 415 F.2d 174, 177-78 (8th Cir. 1969); General Electric Co. v. NLRB, 412 F.2d 512, 516-17 (2d Cir. 1969); NLRB v. David Buttrick Co., 399 F.2d 505, 507 (1st Cir. 1968); and Standard Oil Co. v. NLRB, 322 F.2d 40, 44 (6th Cir. 1963). General Electric Co., 412 F.2d at 517, teaches:

> … that the Act's guarantee of free choice encompasses the right of employees to select, absent extraordinary circumstances, whomever they wish to represent them in collective negotiations with employers. [Citations omitted] An employer has the burden of showing the existence of such extraordinary circumstances. Otherwise the employer violates the Act by interfering with its employees' choice of negotiators, or by refusing to deal with the negotiators once selected. [Citations omitted]
>
> There have been exceptions to the general rule that either side can choose its bargaining representatives freely, but they have been rare and confined to situations so infected with ill-will, usually personal, or conflict of interest as to make good-faith bargaining impractical. . . . Thus, the freedom to select representatives is not absolute, but that does not detract from its significance. Rather the narrowness and infrequency of approved exceptions to the general rule emphasizes its importance. Thus, in arguing that employees may not select members of other unions as 'representatives of their own choosing' on a negotiating committee, the Company clearly undertakes a considerable burden, characterized in an analogous situation in NLRB v. David Buttrick Co., 399 F.2d 505, 507 (1st Cir., 1968), as the showing of a 'clear and present' danger to the collective bargaining process.

On the basis of the statutes and relevant case law, this is a straightforward case. The Library has refused to engage in collective bargaining or contract administration affecting its employees with any person who is not either a paid staff representative for Council 40 or an employee of the library. It has not given any explanation or justification for that position, let alone explained the necessary "extraordinary circumstances" required to justify the abridgement of such a "fundamental" right as the selection of a representative.

By refusing to conduct business with the bargaining unit's chosen representative(s), the employer has violated Sec. 111.70(2), and thus (3)(a)1. It has also interfered with the administration of the union, in violation of sec. 111.70(3)(a)2. It has not, however, refused to conduct business with Local 67 itself, and thus has not violated 111.70(3)(a) 4.

On the facts in evidence, I have serious concerns whether the union has fully complied with its new constitution. However, as the case law indicates, and the respondent has acknowledged, that is a matter for the union's internal consideration, and does not factor in this proceeding.

As to remedy, I have ordered the Library to recognize and conduct business with the at-large officers as the officers for Local 67, AFSCMDE, AFL-CIO (Racine Public Library Unit), without discrimination on the basis of their employment. I have also ordered the posting of the appropriate notice. Because there is no evidence in the record as to the identity or employment status of the at-large officers the bargaining unit wishes to have as its representative(s), or the parties' practices concerning the time and manner of representation, I have not granted the further remedy, as proposed by the union, of ordering the employer "to allow the at-large officers to represent Union members on unpaid time, either during the work day or after work." There are existing standards regarding representation, which should suffice once the representation itself is allowed. See, School District of Cudahy, Dec. No. 33810-A (Levitan, 8/2012), *affirmed by operation of law,* Dec. No. 33810-B (WERC, 8/2012).

Dated at Madison, Wisconsin, this 17th day of December, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/

Stuart D. Levitan, Examiner

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